



Office of the Attorney General
State of Texas

April 30, 1993

DAN MORALES
ATTORNEY GENERAL

Ms. Dealey Herndon
Executive Director
State Preservation Board
P.O. Box 13286
Austin, Texas 78711

OR93-199

Dear Ms. Herndon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19140.

You have received a request for information relating to an accident that occurred at the Capitol Extension construction site. Specifically the request includes:

1. All investigative information (including but not limited to names of witnesses, witness statements, photographs, reports, etc.) regarding the 9/4/91 accident.
2. All Capitol Extension contract documents which pertain to the roles or duties of each party (e.g. general contractor, subcontractors, architects, engineers, the state etc.) regarding jobsite safety or jobsite inspections.
3. The names, address and phone numbers of all parties to the Capitol Extension contract documents.
4. The names and addresses of all persons or firms in any way involved with the design, manufacture, supply, assembly or supervision of the shoring on which Mr. Sorrells was working when he fell.
5. The names, addresses and phone numbers of all persons on the Capitol Extension construction site on 9/4/91.

6. All photographs taken at any time during the Extension project which show workers doing the type of shoring work Mr. Sorrels and his co-workers were doing at the time of his fall.
7. All drawings and specifications pertaining to the previously described shoring.
8. Identification of any other agencies or parties who have investigated this accident.

We understand that you have released the information requested in items 2 through 4. You say that you do not have the information requested in item 1 and part of the information in item 5. A governmental body is not required to obtain information not in its possession or to make available information which does not exist. Open Records Decision No. 572 (1990). Moreover, if another entity holds the information, the Open Records Act does not require the governmental body to obtain it unless the information is held on the government's behalf. Open Records Decision No. 534 (1989). In reference to item 1, you state that you did not investigate the accident because the contractor was responsible for site safety. As to item 5, you state that you do not maintain a list or report of construction personnel on site. You are therefore not obligated to obtain the information requested in item 1, and the portion of item 5 you say is not in your possession.

With respect to item 8, the Open Records Act does not require a governmental body to answer factual questions. Open Records Decision No. 555 (1990). In addition a governmental body is not required to create new information responsive to the request. *Id.* However, if you have a document in existence that lists the information requested in item 8, you are required to disclose the information under the Open Records Act. *Id.* at 2. Accordingly, you are not required to respond to item 8 unless you have a document that contains the requested information.

You claim that much of the information in item 5, and all of items 6 and 7 is excepted from required public disclosure by section 3(a)(3), the litigation exception. Section 3(a)(3) excepts from disclosure information that relates to pending or anticipated litigation. Open Records Decision No. 551 (1990). To determine whether litigation is reasonably anticipated, there must be some outward manifestation to show that litigation is imminent. *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 40 (Tex. 1989). We must then determine whether the governmental body has good cause to believe litigation will follow. *Id.* at 41.

We believe in this case that you reasonably may anticipate litigation. The requestor has indicated that he is looking for third party liability in the accident and he intends to join the State in a lawsuit. Under these circumstances, the State Preservation Board would be included. We have inspected the documents you submitted for our review, and we agree

that they relate to anticipated litigation. You therefore may withhold the information requested in items 5 through 7 under section 3(a)(3).

However, if the information is made available to the other parties in litigation, section 3(a)(3) cannot be invoked to shield the information from public disclosure. Open Records Decision No. 551 at 4. Moreover, section 3(a)(3) is not applicable once you no longer reasonably anticipate litigation or when litigation has concluded. *Id.*

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-199.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Opinion Committee

LRD/KKO/le

Ref.: ID# 19140

Enc: submitted documents

cc: Mr. Donald D. Chapman, Jr.
Bob Binder and Associates
P.O. Box 1046
Austin, TX 78767-1046
(w/o enclosures)